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In the Supreme Court of the United States

OCTOBER TERM, 1984

BEATRICE M. HANSEN, ET AL

PETITIONERS

VS.

JOHNS-MANVILLE SALES CORPORATION, ET AL

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' REPLY TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Does conditional remittitur practice violate the Seventh Amendment to the United States Constitution?

(2) Did the Fifth Circuit's exercise of conditional remittitur in the case at bar violate the Seventh Amendment?

(3) Where the Fifth Circuit Court of Appeals made a detailed appraisal, extremely similar to that offered by Petitioner, does the Fifth Circuit Opinion conflict with *Grunenthal vs. Long Island Ry. Co.*, 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed.2d 309 (1968)?

LIST OF PARTIES

Pursuant to Rule 21.1(b), counsel for Respondents certify that the following is a complete list of all parties:

(1) Beatrice M. Hansen, Petitioner.

(2) Johns-Manville Sales Corporation, Respondent.

(3) Johns-Manville Products Corporation, Respondent.

(4) The Travelers Insurance Company, Intervenor.

(5) The Charter Oak Fire Insurance Company, Intervenor.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COME NOW Respondents and, in Reply to Petitioner's Application for Writ of Certiorari seeking review of the Fifth Circuit's June 11, 1984 judgment, pray the Writ not issue and that same be denied.

OPINIONS BELOW

The Fifth Circuit's Opinion is reported at 734 F.2d

1036 (5th Cir. 1984), as attached in Appendix A. The Order of said court denying the Motion for Rehearing is attached as Appendix B. The jury verdict, and the trial court judgment based thereon are attached as Appendix C and D.

JURISDICTION

Petitioners seek to invoke jurisdiction via 28 U.S.C. §1254(1). The Fifth Circuit's Judgment was entered on June 11, 1984, and Motions for Rehearing denied on September 12, 1984. Mandate issued on November 21, 1984.

FEDERAL STATUTES AND RULES INVOLVED

United States Constitution, Amendment 7.[1]

Federal Rules of Civil Procedure, Rule 59.[2]

STATEMENT OF THE CASE

MR. HANSEN, ("Deceased") was MRS. HANSEN's ("HANSEN") spouse. He began working at Todd Shipyards in 1940, as a pipefitter, tearing out and installing insulation, primarily products containing asbestos manufactured by Respondents. He suffered a serious ankle injury in 1976, and retired due to that injury at the age of 63. He had no plans or expectations of returning to work thereafter.

In 1978, at the age of 65, Decedent developed chest problems, and was diagnosed as having asbestosis and mesothelioma. Thirteen months later, he died. At the time

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[1] Set out in its entirety in Appendix G, as per Rule 21.1(f).

[2] Set out in its entirety in Appendix H, as per Rule 21.1(f).

of his death, Decedent was approximately 66 years old, with thirteen years of life expectancy left. During the thirteen months between diagnosis and death, Decedent took prescription pain medication. At trial, HANSEN testified that she did not drive and relied on Decedent for transportation. Decedent also kept the family checkbook.

HANSEN received a jury trial on Special Interrogatories. The jury assessed actual damages of $1,070,500.00; $260,000.00 for loss of Decedent's care and services; and $800,000.00 for Decedent's pain and suffering over the thirteen-month period between diagnosis and death. The jury also awarded $1,000,000.00 in punitive damages. Special damages were agreed at $10,500.00. The trial court entered judgment for $2,070,500.00 on May 11, 1982.

Respondents filed a Motion for New Trial or (alternatively) for Remittitur, which was denied. Appropriate bonds were filed and an appeal taken. The Fifth Circuit affirmed as to liability, but found the damage awards excessive and beyond reason, based on the record.

The Fifth Circuit suggested a conditional remittitur of $220,000.00 pecuniary loss, $540,000.00 pain and suffering, and $700,000.00 punitive damages, based on the evidence before it. The maximum damage award justified by the evidence was $590,000.00. HANSEN filed a Motion for Rehearing and a Motion for En Banc Rehearing; both were denied.

REASONS FOR DENYING CERTIORARI

HANSEN sets out four grounds to grant Certiorari;[3]

[3] *HANSEN Application for Writ*, at 6-7.

the Fifth Circuit:

> (1) conflicts with prior decisions by this Court, since it failed to make a detailed appraisal of the evidence;
>
> (2) "maximum recovery rule" remittitur violates the Seventh Amendment;
>
> (3) "maximum recovery rule" conflicts with prior Fifth Circuit cases on the standard of review;
>
> (4) conflicts with other circuits regarding the scope of appellate review.

Respondents briefly reply.

Rule 17 notes that Certiorari is granted only where special and important reasons exist. HANSEN attempts to invoke Rule 17.1(a) (conflicting opinions) and Rule 17.1(c) (important unsettled questions). Respondents assert that none of HANSEN's "reasons" validly apply under Rule 17 guidelines.

-1-

The Fifth Circuit made a detailed appraisal of the evidence, as noted in *Grunenthal vs. Long Island Ry. Co., supra.* Indeed, the evidence cited by HANSEN here and that cited by the Court below is overwhelmingly the same. Contrary to HANSEN's veiled assertion, the "remittitur (was) not...taken out of thin air...." *Clissold vs. St. Louis & S.F. Ry. Co.,* 600 F.2d 35, 41 (6th Cir. 1979). The lower court's opinion does not conflict with *Grunenthal.*

Remittitur practice has been uniformly applied in the lower federal courts, considered an appropriate part of the law for almost two hundred years, and has been "frequently stated by this Court." *See,* e.g., *Dimick vs. Shiedt,* 293 U.S. 474, 476, 484-5, 55 S.Ct. 296, 79 L.Ed. 603, 605, 610 (1935). In *Grunenthal, supra* at 393 U.S. 157 n. 3, 21 L.Ed.2d 213 n. 3, this Court noted "(a)ll of (the) Courts of Apeals have held that nothing in the 7th Amendment precludes appellate review of...denial of a motion to set aside an award as excessive." As early as 1889, the High Court in *Arkansas Valley Land & Cattle Co. vs. Mann*[4] stated that "the (remittitur) practice which this Court (earlier) approved...is sustained by sound reason and does not in any just sense, impair the constitutional right of trial by jury." Commentators agree.[5]

This "universal practice"[6] carries many descriptive names. *Grunenthal, supra* at 393 U.S., 159 n. 4, 21 L.Ed.2d, 313 n. 4.[7] The "maximum recovery rule"—used by the Fifth Circuit—is inconsistent with the 7th Amendment,[8] and amounts to a reduction of an excessive award to the maximum amount the jury could properly have awarded.[9]

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[4] 130 U.S. 69, 74, 9 S.Ct. 458, 32 L.Ed 854, 856 (1889)

[5] *See,* e.g., Moore, *Federal Practice* §59.05(3); Barron, Holtzoff & Wright, *Federal Practice & Procedure* §1305.1 (1958); Wright & Miller, *Federal Practice & Procedure* §2815 (1973).

[6] *Moore, supra* at §59.05(3).

[7] Citing *Dagnello vs. Long Island Ry. Co.,* 289 F.2d 797, 802 (2nd Cir. 1961).

[8] *Barron, supra* at §1305.1; *Wright, supra* at §2815.

[9] *Id.*

As noted in *Caldarera vs. Eastern Airlines,*[10] "(u)nless we are to accept any verdict, in whatever amount, as a legally acceptable standard, we must review the amount a jury...awards.***The sky is simply not the limit for jury verdicts...."

The "maximum recovery rule" is not constitutionally infirm and "merely lop(s) off an excrescence."[11]

-3-

The "maximum recovery rule," contrary to HANSEN's claim,[12] is not new. It has existed in the Fifth Circuit under that "generic" title since the mid-1960's, if not earlier. While not all Fifth Circuit opinions have used thee phrase, it amounts to a review of the trial court denial of a Motion for New Trial or (alternatively) for remittitur, and utilizes an abuse of discretion test.[13] HANSEN attempts to create a distinction without a difference.

-4-

HANSEN cites three cases (Second, Fourth and Seventh Circuits) in an effort to show that the Fifth Circuit rule conflicts with other circuits.[14] A reading of these cases

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[10] 705 F.2d 778, 784 (5th Cir. 1983).

[11] *Dimick vs. Shiedt, supra* at 293 U.S., 486, 79 L.Ed 611.

[12] *HANSEN Application for Writ,* at 18.

[13] *cf, Sam's Style Shop vs. Cosmos Broadcasting Corp.,* 694 F.2d 998, 1006 (5th Cir. 1982), with *Caldarera, supra* and the Fifth Circuit opinion at bar, 734 F.2d 1036, 1046-8.

[14] *HANSEN Application for writ,* at 18, citing *Dagnello, supra* (2nd Cir.); *West vs. Richmond Frederichsburg & Potomac Ry. Co.,* 528 F.2d 290 (4th Cir. 1975); *Huff vs. White Motor Co.,* 609 F.2d 286 (7th Cir. 1979).

reflects no conflict. Those three opinions—while not using the magic phrase "maximum recovery rule—(1) merely use the rule's underpinnings and substance ("abuse of discretion"), (2) determine that the juries there did not award excessive damages (based on the record presented in each case) and, thus, (3) hold the trial courts did not abuse their discretion. No conflict appears.

CONCLUSION—REASONS FOR DENYING CERTIORARI

HANSEN presents no special and important reasons to grant Certiorari under Rule 17. Should this Honorable Court disagree, the following is asserted.

ARGUMENT AND AUTHORITIES

Although couched as "four compelling reasons,"[15] the real thrust of HANSEN's complaint is that the Fifth Circuit's conditional remittitur violates the Seventh Amendment.[16] This is not a novel complaint of first impression. The question has been dealt with before and has been resolved (expressly or impliedly) in favor of conditional remittitur practice.

The Seventh Amendment provides in pertinent part that:

> no fact tried by a jury shall be otherwise reexamined in any court...than according to the rules of the common law.[17]

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[15] *HANSEN Application for Writ*, at 6.

[16] *Id.*, at 15, 18-19.

[17] *See*, Appendix G for full text.

Remittitur practice has been consistently upheld in the face of Seventh Amendment challenges.

REMITTITUR PRACTICE APPROVED

Approval of remittitur practice is clearly seen in *Dimick vs. Shiedt, supra*:

> (since it was first) announced...in 1822, the doctrine (of remittitur) has been accepted as the law for more than a hundred years and uniformly applied in the federal courts.... And, as it finds some support in the...English courts prior to the adoption of the Constitution, we may assume that in a case involving a remittitur..., the doctrine would not be reconsidered or disturbed at this late day.

Dimick also noted that the remittitur doctrine had been "frequently stated by this Court,"[18] and "(s)ince...1822, this Court has never expressed doubt in respect of the (remittitur) rule and it has been uniformly applied by the lower federal courts."[19] *Dimick* also involved a detailed analysis of the English case law.[20]

In *Arkansas Valley Land & Cattle Co. vs. Mann, supra* at 130 U.S. 74, 32 L.Ed 856, the Court stated that:

> the [remittitur] practice which this court [earlier]

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[18] *Id.*, at 293 U.S., 476, 79 L.Ed, 605.

[19] *Id.*, at 293 U.S., 483, 79 L.ed, 609. *See.*, e.g., *Grunenthal, supra* at 393 U.S. 157 n. 3, 21 L.Ed.2d. 312 n. 3 ("[a]ll [the] Courts of Appeals have held that nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive."

[20] *Id.*, at 293 U.S., 476, 79 L.Ed, 606.

> approved...is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury.[21]

Petitioner there asserted the same Seventh Amendment argument asserted by HANSEN at bar. *Id.*, at 130 U.S., 73, 32 L.Ed, 855.

In *Curtis Publishing Co. vs. Butts,* 351 F.2d 702 (5th Cir. 1965), affirmed at 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the Fifth Circuit noted that the court:

> had the duty of determining...as a matter of law...what the *maximum* (award) should be.*** Upon determining...(the maximum award), he then had to decide...to grant a new trial or require a remittitur as to the excess. (This) is a permissable course and does not enfringe upon the Seventh Amendment. In making his determination..., he pursued the correct standard.... Obviously in deciding the matter, the judge had to pick a dollar figure beyond which the law would not go. He selected the sum...as the *maximum*.... (emphasis added).

As succently put in *Dimick, supra* at 293 U.S., 486, 79 L.Ed 611:

> where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view

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[21] Citing *Northern Pacific Ry. Co. vs. Herbert,* 116 U.S. 642, 646, 6 S.Ct. 590, 29 L.Ed 755, 758 (1886) ("[i]n requiring the remission of what was deemed excessive, [the court]...did nothing more than require the relinquishment of so much of the damages as...the jury had improperly awarded. The corrected verdict could...be allowed to stand.").

> that what remains is included in the verdict along with the unlawful excess—in that sense that it has been found by the jury—and that the remittitur has the effect of merely lopping off an excrescence.[22]

"What remains" after remittitur? The "maximum recovery." The Fifth Circuit did not violate the Seventh Amendment.[23]

HANSEN'S DISTINCTION WITHOUT A DIFFERENCE

HANSEN attacks the Fifth Circuit's "maximum recovery rule," by which the Fifth Circuit arrived at the remittitur.[24] This "maximum recovery rule" is but a different phrasing of the well-settled standard of review. For example, this Court in *Grunenthal*[25] noted that:

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[22] Similarly, this Court has found that Rule 50 (Motion J.N.O.V.) practice does not violate the Seventh Amendment. *Neely vs. Erby Constr. Co.*, 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967). Neither does a directed verdict. *Galloway vs. U.S.*, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed 1458 (1943). *cf,* Rule 50. 59.

[23] Remittitur practice "has become so universal...and has had the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without a judicial uprooting of precedent akin that effected by Erie-Tompkins." Moore, *Federal Practice* §59.05(3), at 3738-40. The ordering of a remittitur conditioned upon a new trial is a "widely recognized remedy" regarding excessive verdicts. *Malandris vs. Merrill, Lynch,* 703 F.2d 1152, 1168 (10th Cir. 1981), cert. den. at __ U.S. __, 104 S.Ct. 92, __ L.Ed.2d __ (1984).

[24] *HANSEN Application for Writ,* at 7.

[25] 393 U.S. at 159 n. 4, 21 L.Ed.2d, 313 n. 4, citing *Dagnello vs. Long Island Ry. Co., supra* at 802.

> (t)he standard has been variously phrased. Common phrases are "grossly excessive," "inordinate," "shocking to the judicial conscience," "outrageously excessive," "so large as to shock the conscience of the court," "monstrous" and many others.

The Fifth Circuit used several of these phrases in the instant opinion[26] and merely used the phrase "maximum recovery rule."[27] HANSEN's attack appears predicated on the "phrase" identifying the remittitur test, and not the standard used.

This Fifth Circuit test, now attacked by HANSEN, is noted by the commentators as the only one reasonably consistent with the Seventh Amendment. Barron, Holtzoff and Wright, *Federal Practice and Procedure* §1305.1 (1958) (at p. 376); Wright and Miller, *Federal Practice and Procedure* §2815 (1973) (at pp. 104-5). These authorities describe the rule to be:

> that the jury by its excessive verdict intended to award the *maximum*.... This theory permits reduction only to the highest amount that the jury could have properly awarded. (emphasis added).[28]

This is obviously a description of the "maximum recovery rule." HANSEN appears to create a distinction without

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[26] 734 F.2d 1036, 1046-7 (5th Cir. 1984) ("shock the judicial conscience," "contrary to reason," "excessive," etc.).

[27] *See*, e.g., *Caldarera vs. Eastern Airlines, supra* at 784.

[28] *Wright and Miller, supra* at §2815 (at p. 104); *Barron, Holtzoff and Wright, supra* at §1305.1 (at p. 376). *See*, e.g., Wright, *Law of Federal Courts* §95 (1976) (at p. 468).

a difference.[29] The Fifth Circuit recognized the other phrases used to denominate the rule, but called it "the maximum recovery rule."[30]

The "maximum recovery rule" is not new; it represents no departure from past practice. For example, in *Gorsalitz vs. Olin Matheson Chemical Corp.*, 429 F.2d 1033 (5th Cir. 1970), modified on remand and affirmed at 456 F.2d 180 (5th Cir. 1972), cert. denied at 407 U.S. 921, 92 S.Ct. 2463, 32 L.Ed.2d 807 (1972),[31] the Court noted the award to be greater than "the maximum that the jury reasonably could find." In *Bonura vs. Sea-Land Services, Inc.*, 505 F.2d 665, 669 (5th Cir. 1974), the court phrased the test as "the maximum amount that is reasonably supported by the evidence." Similar expressions may be found in *Carlton vs. H. C. Price Co.*, 640 F.2d 573, 582 n. 14 (5th Cir. 1981); *Keyes vs. Lauga*, 635 F.2d 330, 336 (5th Cir. 1981); *Jenkins vs. Acquatic Contractors & Engineers*, 446 F.2d 520, 522 (5th Cir. 1971). *See also, Gleason vs. Hall*, 555 F.2d 514, 518-19 (5th Cir. 1977); *Glazer vs. Glazer*, 278 F.Supp. 476, 478-82 (E.D. LA. 1968); *Howell vs. Marmpegaso Compania Naviera*, 536 F.2d 1032, 1034 (5th Cir. 1976); *Natco, Inc. vs. Williams Bros. Eng. Co.*, 489 F.2d 639 (5th Cir. 1974).

As noted in *Donovan vs. Penn Shipping Co.*,[32]

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[29] *See*, e.g., *Wilson vs. Taylor*, 733 F.2d 1539, 1548-9 (11th Cir. 1984).

[30] *See*, e.g., *Caldarera, supra* at 783-4; *Opinion*, at 734 F.2d, 1036, 1046-7.

[31] As noted in *Stapleton vs. Kawasaki Heavy Ind., Inc.*, 608 F.2d 571, 574 (5th Cir. 1979).

[32] 429 U.S. 648, 649-50, 97 S.Ct. 835, 51 L.Ed.2d 112, 114 (1977).

> the proper role of the trial and appellate courts...in reviewing the size of jury verdicts is...a matter of federal law (citations omitted).

Additionally, "(i)f the amount of damages awarded is excessive, it is the *duty* of the trial judge to require a remittitur or new trial" (emphasis added).[33] The Fifth Circuit opinion merely reflects the holding that the trial court had abused its discretion in failing to suggest remittitur itself.

EFFECT OF HANSEN'S THEORY

HANSEN's claim seems to be that remittitur practice is unconstitutional.[34] Although this argument runs afoul of judicial precedent and interpretation of approximately two hundred years duration, it also would have a significant and adverse effect on American jurisprudence. HANSEN would, in effect, place the jury awards *beyond judicial review.*

The inevitable corrollary to HANSEN's theory was precisely set out in *Caldarera:*

> (u)nless we are to accept any verdict, in whatever amount, as a legally acceptable measure, we must review the amount a jury...awards.***The sky is simply not the limit for jury awards....[35]

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[33] *Linn vs. United Plant Guard Workers*, 383 U.S. 53, 65-6, 86 S.Ct. 657, 15 L.Ed.2d 582, 591 (1966).

[34] *HANSEN Application for Writ*, at 7-9.

[35] *Caldarera, supra* at 784; noted in the case at bar, 734 F.2d, *supra* at 1046. *See*, e.g., *Grunenthal, supra* at 393 U.S., 159, 21 L.Ed.2d, 313, citing *Dagnello vs. Long Island Ry. Co., supra* at 806 ("surely there must be an upper limit and whether that has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law").

The sum and substance of HANSEN's claim appears to be that "the sky *is* the limit for jury verdicts" and "any verdict, in whatever amount, is *the* legally acceptable measure." This is not only unsound but flies in the face of two hundred years of American jurisprudence.

WHAT DID THE FIFTH CIRCUIT DO?

The Fifth Circuit merely applied the standard test to the facts before it. Contrary to HANSEN's complaint that a "detailed appraisal of the evidence" was not made,[36] the Fifth Circuit obviously made such an appraisal.[37] The opinion notes, *inter alia*,

> (1) the jury award for the elements of damage claimed, 734 F.2d, 1046;
>
> (2) decedent's retired status. *Id.*, at 1039, 1046;
>
> (3) decedent's lack of plans to return to work. *Id.*, at 1046;
>
> (4) the services he performed for HANSEN. *Id.*, at 1046;
>
> (5) HANSEN's claim that she did not drive and depended upon decedent to take her places. *Id.*, at 1046;
>
> (6) decedent kept the family checkbook. *Id.*, at 1046;
>
> (7) the "care, advice, counsel and attention that decedent provided." *Id.*, at 1046-7;

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[36] *HANSEN Application for Writ*, at 15.

[37] 734 F.2d, 1039, 1046-7.

(8) decedent's thirteen-year life expectancy at the time of his death; *Id.*, at 1047;

(9) decedent's symptoms did not manifest themselves until May 1978. *Id.*, 1047;

(10) decedent was 65 years old in 1978. *Id.*, at 1039;

(11) decedent lived thirteen months after May 1978. *Id.*, at 1039, 1047;

(12) decedent was on pain medication for the thirteen months. *Id.*, at 1047;

(13) decedent suffered some pain despite the medication and that he suffered mental anguish." *Id.*, at 1047;

(14) decedent began working for Todd Shipyards in 1940. *Id.*, at 1038;

(15) decedent suffered a serious ankle injury in 1976 and retired due to that injury. *Id.*, at 1039;

(16) decedent had mesothelioma and asbestosis. *Id.*, at 1039 n. 2.

HANSEN goes into somewhat greater detail on the facts of the case,[38] but the same picture emerges from the opinion. HANSEN, in effect, notes the same basic facts as the Fifth Circuit:

(1) decedent was 65 years old in 1978.; *HANSEN Application for Writ*, at 2;

(2) the problem first manifested itself in 1978. *Id.*;

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[38] *HANSEN Application for Writ*, at 2-4.

(3) decedent began work for Todd Shipyards in 1940. *Id.;*

(4) decedent suffered an ankle injury in 1976. *Id.;*

(5) decedent retired in 1976. *Id.;*

(6) decedent was diagnosed with asbestosis and mesothelioma. *Id.;*

(7) decedent's life expectancy was thirteen years. *Id.;*

(8) HANSEN did not drive a car and relied on decedent to take her places. *Id.* at 3;

(9) decedent kept the family checkbook. *Id.;*

(10) HANSEN depended on decedent. *Id.;*

(11) decedent began to suffer pain in 1978 when he was first diagnosed and mental anguish. *Id.*, at 2-3;

(12) decedent's death deprived him of whatever activity he planned for his remaining retirement years. *Id.*, at 3-4;

(13) decedent lived thirteen months after his diagnosis in 1978. *Id.*, at 2, 4.

(14) decedent had mesothelioma and asbestosis. *Id.* at 2.

The Fifth Circuit recites the *same basic facts* as HANSEN cites in the Application for Writ. The Fifth Circuit did not fail to make a detailed appraisal of the evidence bearing on damages. No error in this regard is shown. "Where remittiturs...are ordered by an appellate court, they are not

regarded as taken out of thin air...." *Clissold vs. St. Louis & S.F. Ry. Co., supra* at 41.

APPELLATE COURTS HAVE REMITTITUR AUTHORITY

As noted by the Fifth Circuit Opinion at bar,

> (o)ur position to grant a remittitur is the same as that of the district court.[39]

Accord: Howell vs. Marmpegaso Co. Naviera, supra at 1035; *Shingleton vs. Armor Velvet Corp.*, 621 F.2d 180, 182 (5th Cir. 1980); *Stapleton vs. Kawasaki Heavy Ind., Inc., supra* at 574 n. 7; *Davis vs. Safeway Stores, Inc.*, 532 F.2d 489, 491 n. 4 (5th Cir. 1976); *Budge vs. Post*, 643 F.2d 372, 376 (5th Cir. 1981); *Carlton vs. H. C. Price, supra, Warren vs. Ford Motor Credit Co.*, 693 F.2d 1373, 1380 (5th Cir. 1982). *See*, e.g., *Lanfranconi vs. Tidewater Oil Co.*, 376 F.2d 91, 96-7 (2nd Cir. 1967), cert. denied 389 U.S. 951, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967); *Lebrecht vs. Bethlehem Steel Corp.*, 402 F.2d 585, 590 (2nd Cir. 1968); *Banker's Life & Cas. Co. vs. Kirtley*, 307 F.2d 418, 423 (5th Cir. 1962); *Dagnello, supra* at 802-4; *Spray-Rite Service Corp. vs. Monsanto Co.*, 684 F.2d 1226, 1243-4 (7th Cir. 1982), affirmed at __ U.S. __, 104 S.Ct. 1464, __ L.Ed.2d __ (1984); *Wheatley vs. Ford*, 679 F.2d 1037, 1039 (2nd Cir. 1982); *Malandris vs. Merrilly, Lynch, supra; Clissold vs. St. Louis & S.F. Ry. Co., supra* at 41; *Wilson vs. Taylor*, 733 F.2d 1539, 1548-9 (11th Cir. 1984). The commentators agree that the federal Courts of Appeal have the same remittitur authority as the

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[39] *Opinion*, at 1046, citing *Caldarera, supra* at 784.

federal trial court. *Wright & Miller, supra* at §2820; *Moore, Federal Practice* §59.05(3) (2nd ed. 1974).[40]

HANSEN SHOWS NO CONFLICT BETWEEN CIRCUITS

HANSEN cites *Dagnello, supra* at 806, *West vs. Richmond, Fredricksburg & Potomac Ry. Co., supra,* at 291,[41] and *Huff vs. White Motor Corp., supra* at 295-6[42] in an effort to show that the Fifth Circuit conflicts with other circuits.[43] A reading of these cases does not support HANSEN's "conflict" argument. They merely (1) reflect that standard "abuse of discretion" test, (2) that the circuit courts there did not feel the juries awarded damages in excess of the maximum based on the record of each case, and thus, (3) the trial courts did not abuse their discretion. *HANSEN presents no conflict.*

FIFTH CIRCUIT CORRECT: PUNITIVE DAMAGES

HANSEN complains the punitive damage remittitur was improper.[44] It was not.

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[40] Appellate courts have the authority to grant a Motion J.N.O.V. and do not violate the Seventh Amendment in exercising such power. *Neely vs. Erby Constr. Co., supra* at 386 U.S., 322, 18 L.Ed.2d, 80. Motions for Directed Verdict, likewise, do not violate the Seventh Amendment. *Galloway vs. U.S., supra* at 319 U.S., 388-93, 87 L.Ed. 1467-72. *cf. Rule* 50, 59.

[41] Noting the trial court memorandum that "the jury was not free to give just what they want."

[42] Citing *Dagnello,* "surely there must be an upper limit...."

[43] *HANSEN Application for Writ,* at18.

[44] *HANSEN Application for Writ,* at 16.17.

The relevant test regarding an excessive punitive damage award is not at issue.[45] The factors are recently noted in *Alamo Nat'l Bank vs. Kraus.*[46] Further, as seen in *Tynberg vs. Cohen,* 13 SW 315, 316-17 (TEX. 1980):

> (a) power such as may be exercised by a jury in awarding exemplary damages is liable to great abuse, may often lead to great oppression, and there is no class of cases where the conservation of the judge should more frequently find field for action.

Accord: Maxey vs. Freightliner Corp., 665 F.2d 1367, 1377 (5th Cir. 1982). The "unwaivering" rule is that punitive damage awards must be reasonably proportioned to actual damage awards. *Maxey, supra* at 1377; *Alamo Nat'l Bank, supra* at 910. There can be "no set rule or ratio...." *Id.*

HANSEN seeks a three-to-one ratio (punitive to actual), which even the jury did not award. The Fifth Circuit does not "assert...that three-to-one is the correct proportion." *Maxey, supra* at 1378, *Miley vs. Oppenheimer,* 637 F.2d 318, 331 (5th Cir. 1981) ("nothing magical about the three times compensatory damages formula"). In *Miley,*[47] the Court affirmed a three-to-one ratio awarded by the jury; here, the one-to-one ratio is preserved, both before and after remittitur.[48] The jury-awarded proportion is maintained both cases.

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[45] *Id.,* at 16; *Opinion* at 734 F.2d, 1046.

[46] 616 SW2d 908, 910 (TEX. 1981).

[47] Relied on at *HANSEN Application for writ,* at 16-17.

[48] $1,000,000.00 punitive; $1,060,000.00 actual (pre-Remittitur); $300,000.00 punitive; $290,000.00 actual (post-Remittitur); *Opinion,* at 734 F.2d, 1039, 1046-7.

HANSEN admits the Fifth Circuit used the proper test and factors.[49] A comparison of the evidence relied on by HANSEN and that cited by the Fifth Circuit are, overwhelmingly, the same. The jury awarded a one-to-one ratio (actual to punitive); the Fifth Circuit concurred. Although HANSEN seeks a three-to-one ratio, this is something the jury just didn't do. Appropriately (given the test and the evidence) neither did the Fifth Circuit. The Fifth Circuit: (1) correctly considered the evidence; (2) correctly found the punitive damage award excessive; (3) correctly used the agreed-upon test; *and* (4) correctly suggested a remittitur of the punitive damage award.

As with actual damages,

> (i)t is the duty of the court to keep a verdict for punitive damages within reasonable bounds, including the purpose to be achieved and the mala fides of the defendant in the particular case.

Lanfronconi vs. Tidewater Oil Co., supra at 97; *Roginsky vs. Richardson-Merrell, Inc.*, 378 F.2d 832, n. 12 (2nd Cir. 1967).

CONCLUSION

HANSEN's assertion that remittitur practice violates the Seventh Amendment is wrong. Remittitur practice has been a part of federal jurisprudence for almost two hundred years and is uniformly applied in the lower federal courts. As noted by this Honorable Court as early as 1889, remittitur practice "is sustained by sound reason and does not, in any just sense, impair the constitutional

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[49] *HANSEN Application for Writ*, at 16.

right of trial by jury."[50] A remittitur "merely lop(s) off an excresence,"[51] the amount (post-remittitur) also having been found by jury trial.[52]

The Fifth Circuit's "maximum recovery rule," according to the authorities, is consistent with the Seventh Amendment, not in conflict therewith. It provides for the maximum possible recovery under the facts presented. The Fifth Circuit clearly made a detailed appraisal of the evidence, citing (in overwhelming fashion) the same evidence HANSEN now places before this High Court.

The lower court found the jury award was "excessive" and "contrary to reason,"[53] (contrary to HANSEN's allegation[54]), and, therefore, that the trial court had abused its discretion in failing to suggest conditional remittitur.[55] The appropriate standard, although called by many names, is the one used by the court below.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondents pray that Petitioners' Petition for Writ of Certiorari be denied, that the Fifth Circuit's Opinion in these regards be, in all things, affirmed, and that Respondents have their costs.

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[50] *Arkansas Valley Land & Cattle Co. vs. Mann, supra.*

[51] *Dimick vs. Shiedt, supra.*

[52] *Id.*

[53] *Opinion,* at 734 F.2d, 1047.

[54] *HANSEN Application for Writ,* at 18-19.

[55] *Opinion,* at 734 F.2d, 1046-7.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Otto D. Hewitt, III, hereby certify that three true and correct copies of the foregoing have been served upon opposing counsel by mail, same to Mr. Atreus M. Clay, 5643 Turtle Creek Lane, Houston, TX 77017, on this the 7th day of January, 1985.

Otto D. Hewitt, III

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2276

BEATRICE MAE HANSEN, ET AL.,
Plaintiffs-Appellees,

v.

JOHNS-MANVILLE PRODUCTS
CORPORATION, ET AL.,
Defendants,

JOHNS-MANVILLE SALES CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(June 11, 1984)

Before RUBIN and RANDALL, Circuit Judges, and SEAR,* District Judge.

RANDALL, Circuit Judge:

Johns-Manville Sales Corporation and Johns-Manville Products Corporation (collectively "Johns-Manville")

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* SEAR, District Judge of the Eastern District of Louisiana, sitting by designation.

appeal a jury verdict awarding compensatory and punitive damages to the widow of Andrew Hansen, a former shipyard worker, for wrongful death caused by exposure to Johns-Manville asbestos products. We affirm as to liability, but remand to the district court to order a remittitur or a new trial at the option of the plaintiff.

I.

Andrew Hansen ("decedent") began working for Todd Shipyards in 1940 as a pipefitter, tearing out old insulation in ships and installing new insulation. During his employment, decedent worked primarily with products containing asbestos[1] that were manufactured by Johns-Manville. Decedent suffered a serious ankle injury in 1976 and retired due to that injury.

In 1978, at age 65, decedent developed chest problems. He was ultimately diagnosed as suffering from asbestosis and mesothelioma, both of which are caused by exposure to asbestos.[2] Thirteen months later, he died.

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1. Asbestos is the name of a group of naturally occurring fibrous minerals known for their properties of relative indestructibility and resistance to heat and fire. During World War II, the protective clothing, insulation and shipbuilding industries created a dramatic increase in the demand for asbestos. Once considered harmless, asbestos is now regarded as one of the most dangerous of all natural minerals. *See* Special Project, *An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 Vand. L. Rev. 575 (1983).

2. Parenchymal asbestosis is the earliest known and most common asbestos-related disease. In some cases, asbestosis may become manifest within ten years of the date of initial exposure. In general, asbestosis manifests itself between ten and twenty-five years after initial exposure. Inhalation of asbestos fibers initiates a scarring process that destroys air sacs in healthy lung tissue. The result is a decrease in pulmonary function and lung volume. Symptoms include shortness of breath, coughing, chest pains and clubbing of fingers. The disease is not always fatal, but it is progressive and incurable.

Decedent's widow ("Hansen") filed suit against Johns-Manville and thirteen other defendants in 1979. Hansen alleged causes of action based upon strict liability for the manufacture of the asbestos-containing insulation and upon negligence for failure to adequately test and inspect, and for failure to warn. Prior to trial, all defendants, except Johns-Manville, were non-suited on Hansen's motion. A jury trial was then held. The jury returned answers to special interrogatories finding for Hansen on all counts and awarded Hansen $260,000 for loss of care and services, $800,000 for decedent's anguish and pain and suffering, and $1,000,000 in punitive damages. Judgment in the amount of $2,060,000 was entered by the district court on May 11, 1982. Johns-Manville's motions for judgment n.o.v., remittitur, and new trial were denied. Johns-Manville appeals.

II.

On appeal, Johns-Manville raises twelve distinct issues relating to evidence submitted at trial, interrogatories submitted to the jury, the various post-judgment motions, and the award of punitive damages. We will address each of these issues in turn.

Deposition Testimony of Dr. Kenneth Smith.

Johns-Manville asserts that the trial judge erred in admitting the deposition testimony of Dr. Kenneth Smith,

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Mesothelioma is a malignant tumor in the membrane lining of the lungs, chest cavity and abdominal cavity which metastizes quickly and is generally fatal. Unlike asbestosis, no relationship between the degree of exposure to asbestos and development of the disease has been established. Mesothelioma has developed in individuals exposed to minimal quantities of asbestos. *See* Comment, *Asbestosis: Who Will Pay the Plaintiff?* 57 Tul. L. Rev. 1491, 1491-93 (1983); Special Project, *supra* note 1, at 579.

former medical officer of Johns-Manville, because no proper foundation was laid showing the nature of his employment at the time of the deposition, the course of his knowledge, or his authority to speak for the company. *See generally* H. Wigmore, *Evidence* § 654 (3d ed. 1940). This argument is without merit. Dr. Smith's deposition clearly reveals the nature of his medical practice at the time of the taking of the deposition. As to the course of his knowledge, Dr. Smith's deposition relates his educational background and the fact that he served as Medical Director of Johns-Manville until 1966. Finally, since Dr. Smith was not testifying as an agent for Johns-Manville, authority to speak as an agent was not required. Dr. Smith's deposition was properly admitted.

The "Sumner Simpson" Papers.

Johns-Manville contends that the district court erred in admitting into evidence several documents from the "Sumner Simpson" papers. These papers consist of various correspondence, surveys and memoranda compiled by Sumner Simpson, the President and later Chairman of the Board of Raybestos Corporation ("Raybestos"), and discovered after his death. Raybestos, like Johns-Manville, employed asbestos in its products. Several documents from the collected papers were admitted into evidence to show that Johns-Manville knew of the alleged dangers of asbestos prior to 1964 and thus was negligent and grossly negligent in failing to warn of those dangers. Johns-Manville objects to the admission of these documents on the grounds that the papers were not authenticated, that they were heasay and not within any exception, and that they are irrelevant to any issue in the case.

In a similar case decided recently by this court, *Jackson v. Johns-Manville Sales Corp.*, No. 82-4288, slip op. at 2736 (5th Cir. March 23, 1984), we held that the district court erred in admitting three letters from the Sumner Simpson papers, including one admitted in the present case, on the ground that they were relevant to no issue in the case. We determined that, because the letters introduced concerned studies having to do with workers in asbestos mines, they were irrelevant to the issue of the defendants' knowledge of dangers regarding insulation workers. We need not decide, however, whether admission of the Sumner Simpson papers was erroneous in this case, for even assuming, *arguendo*, that such admission was error, we find that, on the record presented in this case, it was harmless error.

The Sumner Simpson papers were introduced in this case to show that Johns-Manville knew or should have known of the dangers of asbestos to shipyard workers and insulators prior to 1964 and thus, that Johns-Manville had a duty to warn of that danger. However, Hansen presented other evidence, particularly the testimony of Dr. Smith,[3] which would show that Johns-Manville knew of the dangers of asbestos to insulation workers well before 1964. Thus, the introduction of the Sumner Simpson papers was merely cumulative. It is well settled that the improper admission of evidence that is merely cumulative on matters shown by other admissible evidence is harmless error. *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 307 (5th Cir. 1978). Thus, even if the district court erred in admitting the Sumner Simpson papers in this case, an issue that we expressly do not decide, it was harmless error.

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3. Dr. Smith testified that he told Johns-Manville of the dangers asbestos presented to insulation workers as early as the 1940s.

Punitive Damages/Gross Negligence.

Johns-Manville raises several issues with regard to the jury's finding of gross neglience and award of punitive damages. Under Texas law, a plaintiff is entitled to punitive damages upon a showing of gross negligence, i.e., that the defendant was consciously, knowingly indifferent to the plaintiff's welfare and safety. *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1374 (5th Cir. 1982). Johns-Manville argues that the potential for overkill in the award of punitive damages in mass products liability situations such as this[4] is inconsistent with the underlying policy objectives of both strict liability and punitive damages. Johns-Manville also argues that it has been subjected to repeated awards of punitive damages, thus unconstitutionally subjecting it to double jeopardy. Johns-Manville further argues that the district court erred in denying its motions for directed verdict,[5] judgment n.o.v., and new

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4. Approximately 30,000 individual plaintiffs have filed suits against asbestos manufacturers since 1973, and industry experts predict that plaintiffs will file an additional 500 suits each month. The potential liability of Johns-Manville alone for compensatory damages alone has been estimated to exceed $2 billion. On August 26, 1982, Johns-Manville filed for Chapter 11 reorganization, claiming that the exposure it faced in asbestos litigation threatened its solvency and, ultimately, its viability. In support of its claim, Johns-Manville pointed out that in 1981 and the first half of 1982 litigation had resulted in ten punitive damage verdicts against it at an average of $616,000 per verdict. In re *Johns-Manville Corp.*, No. 82 B (S.D. N.Y. petition filed August 26, 1982). *See generally* Special Project, *supra* note 1, at 691.

5. Johns-Manville presents this argument as "[t]he trial court erred in submitting special interrogatory no. 8 (having to do with gross negligence) because there was no evidence to support its submission." Because Johns-Manville is arguing that the issue should not have been submitted to the jury because of insufficient evidence, this argument is more properly addressed to the district court's denial of Johns-Manville's motion for directed verdict. We will treat it as such. Subsequent issues that were similarly presented will be treated as appeals from the denial of a directed verdict as well.

trial with regard to gross negligence and punitive damages.

In *Jackson v. Johns-Manville Sales Corp., supra,* we held that Mississippi substantive law would disallow punitive damages in asbestos products liability actions. In *Jackson,* the plaintiff, who had contracted asbestosis, brought a products liability action against Johns-Manville and Raybestos-Manhattan, Inc. After the jury returned a verdict in favor of the plaintiff and awarded actual and punitive damages, the defendants appealed. A panel of this court disallowed the punitive damages awarded, holding that Mississippi substantive law would disallow such awards in a similar situation, because in the extraordinary circumstances in which asbestosis litigation is set, the allowance of punitive damages is incompatible with the objectives of and would disrupt the viability of the strict liability cause of action. Finding that strict liability in Mississippi "seeks not merely to assure compensation for the individual plaintiff, but to achieve the broader societal objective of equitable loss distribution," the *Jackson* panel determined that the presence of a viable enterprise is essential to the maintenance of effective loss distribution in strict liability. Because of the number of similar suits already filed, asbestos defendants face repeated assessments of punitive damages that threaten to exhaust their resources. Therefore, the panel determined that, at the point at which awards of punitive damages destroy the viability of the enterprise, the remedy of punitive damages becomes antithetical to the policy of strict liability and thus, that punitive damages must not be allowed. Furthermore, the panel found that the basic policy objectives of punitive damages—punishment and deterrence—are satisfied by multiple exposure to compensatory dam-

ages. Johns-Manville presents similar arguments in the present case, urging that the very attributes of the Mississippi law of strict liability that prompted the *Jackson* panel to find that Mississippi law would disallow punitive damages in this type of case are present in Texas law as well. Thus, Johns-Manville argues, this panel should follow the panel decision in *Jackson*.

Following a review of the relevant decisions of the Texas courts, we find that we are unable to follow *Jackson* in this case. At least one Texas court has said that punitive damages may be recovered under Article 16, Section 26 of the Constitution of the State of Texas[6] in a strict liability action for the death of the user of a defective product. *Heil Co. v. Grant*, 534 S.W.2d 916, 926 (Tex. Civ. App.—Tyler 1976 writ ref'd n.r.e.) ("We believe that exemplary damages may be recovered under [Tex. Const. art. 16, section 26] in a strict liability action for the death of the user of a defective product."); *see also Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371-72 & n.4 (5th Cir. 1982).[7] To be sure, *Heil* did not involve a mass products liability situation such as the one

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6. Article 16, section 26 provides:

> Every person, corporation, or company, that may commit a homicide, through a wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be. . . .

Tex. Const. art. 16, section 26.

7. In *Maxey*, we were presented with the argument that, as a matter of law, punitive damages are not available in products liability cases in Texas. Noting the language of *Heil*, we said: "Absent some reason to believe that the Texas courts, when presented with the question, will erect such a bar to recovery of exemplary damages, which otherwise are guaranteed by the Texas Constitution, this Court is reluctant to do so." 665 F.2d at 1371 n.4. There have been no such indications from the Texas courts within the intervening two years that would convince us to depart from our conclusion in *Maxey*.

facing this court in *Jackson* and in the present case. However, to the extent that punitive damages are guaranteed to claimants by the Texas Constitution, such a fact is irrelevant; article 16, section 26 does not distinguish between mass torts and singular torts. We also recognize that the above-referenced language in *Heil* is dicta. But, while it is not definitively settled that punitive damages are guaranteed by the Texas Constitution in strict liability actions for the death of a user of a defective product, the *only* suggestion we have from the Texas courts is that there is, indeed, such a right. Absent a clear indication from the Texas courts to the contrary, we are *Erie*-bound not to dictate otherwise. Accordingly, we find no basis upon which to hold that Texas courts would disallow punitive damages in a case such as this.[8]

Johns-Manville next contends that the award of punitive damages in mass tort cases is unconstitutional because punitive damages are analogous to criminal penalties. Thus, Johns-Manville argues that the constitution requires assurance against multiple, unrestrained punishments in the form of punitive damages. In essence, Johns-Manville is arguing that it is being subjected to double jeopardy.

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8. In addition to the Texas constitutional provision, there is another factor which distinguishes *Jackson* and Mississippi law from the present case and Texas law. *Jackson* did not involve an action for wrongful death, but was instead an action for personal injury. While the Texas Supreme Court has yet to address the issue, at least one Texas appellate court has upheld an award of punitive damages in a products liability action for personal injury which did not involve wrongful death. *Rawlings Sporting Goods Co. v. Daniels*, 619 S.W.2d 435 (Tex. Civ. App.—Waco 1981, writ ref'd n.r.e.). Thus, there is some suggestion that the Texas courts may allow punitive damages in products liability actions even in cases not covered by article 16, section 26, an issue which we need not decide in this case.

The fifth amendment guarantee against double jeopardy, applicable to the states through the fourteenth amendment, protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1968). However, the jeopardy to which the fifth amendment refers is not present in proceedings that are not "essentially criminal." *Breed v. Jones*, 421 U.S. 519, 528 (1974). In *Breed*, the Supreme Court faced the question of whether juvenile proceedings are "essentially criminal" for purposes of the double jeopardy prohibition. In finding that juvenile proceedings are "essentially criminal," the Court relied upon the purpose of the proceeding, the potential consequences, and the fact that the action was brought by and backed by the resources of the state. The Court found that the purpose of the juvenile proceeding was to determine whether the defendant had committed acts that violate a criminal law. The possible consequences of the proceeding were the stigma inherent in the determination of a criminal violation and the deprivation of liberty for many years.

Based upon *Breed*, we determine that punitive damages awarded in a private lawsuit by an individual plaintiff are not part of an "essentially criminal" proceeding and, thus, do not fall within the purview of the prohibition against double jeopardy. A jury's determination that a homicide has occurred as a result of gross negligence necessary to award punitive damages is not a determination that a criminal law has been violated. Moreover, that determination does not carry with it the conseqeunces that the *Breed* Court found necessary for an "essentially criminal" proceeding. While Johns-Manville will be deprived of property, it will not suffer the stigma normally accompanying criminal proceedings. Thus, the conse-

quences that attend the type of proceeding involved here are not of the variety that the Court has recognized as rising to the level of requiring protection against double jeopardy. Perhaps more importantly, this is not an action brought by the state, but one brought by a private individual. We have uncovered no cases, and Johns-Manville points us to none, in which a court has afforded double jeopardy protection as to any proceeding that was not initiated by the state. Accordingly, we do not find that Johns-Manville has been subjected to double jeopardy in violation of the fourteenth amendment.

Johns-Manville next contends that the district court erred in denying its motion for directed verdict and motion for judgment n.o.v. with relation to gross negligence and punitive damages. The propriety of a district court's denial of a directed verdict or judgment n.o.v. is measured by the standard set by this court in *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc):

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury.

On appeal, the court is to view all the evidence with all reasonable inferences most favorable to the nonmoving party. *Campbell v. Bowlin*, 724 F.2d 484, 489 (5th Cir.

1984). Thus, the question before this court on appeal is whether there was sufficient evidence concerning Hansen's allegations of gross negligence to present a jury question.

Gross negligence is defined under Texas law as "that entire want of care which would raise the belief that the act or omission complained of was a result of a conscious indifference to the right or welfare of the person . . . affected by it." *Missouri Pacific Railroad Co. v. Shuford,* 72 Tex. 165, 10 S.W. 408, 411 (1888); *see also Maxey v. Freightliner Co., supra,* at 1372; *Burk Royalty Co. v. Walls,* 616 S.W.2d 911 (Tex. 1981). Punitive damages may be awarded upon a showing of gross negligence. Johns-Manville argues that it submitted evidence that showed that it made efforts to inspect its products and to participate in safety studies; that it began to issue warnings with its asbestos-containing products in 1964, as soon as scientific evidence was available that proved a relationship between those products and asbestosis; and that it developed an asbestos-free replacement in 1971. This evidence, Johns-Manville argues, represents strange behavior for a defendant who allegedly was wilfully, intentionally and consciously indifferent to decedent's rights, welfare and safety. However, although much evidence in favor of Johns-Manville was developed at trial, the question confronting this court is not whether this court as a trier of fact would decide the issue in favor of one side or the other, but whether there was sufficient evidence in support of Hansen's claim to present a jury question. We hold that there was. Hansen presented the testimony of Dr. Smith, a former medical officer of Johns-Manville. Dr. Smith testified that he informed Johns-Manville of the hazards asbestos presented to asbestos insulation

workers and recommended placing warnings on insulation products as early as the 1940s, but that Johns-Manville did not act on his recommendations. We believe that this evidence is sufficient to present a jury question. If the jury believed the testimony of Dr. Smith, they could reasonably find that Johns-Manville had been grossly negligent in failing to warn Hansen of the dangers related to its products. It is the function of the jury, not the court, to determine the credibility of witnesses. *Boeing Co. v. Shipman, supra,* at 375. Accordingly, we hold that the district court properly denied Johns-Manville's motion for a directed verdict and motion for judgment n.o.v. with relation to gross negligence and punitive damages.

Johns-Manville also argues that the district court erred in denying its motion for a new trial with relation to gross negligence and punitive damages, alleging that the jury's answers to special interrogatories were against the great weight of the evidence. On a motion for new trial, the trial judge is free to weigh the evidence and may grant a new trial if he believes the verdict is contrary to the weight of the evidence. *United States v. An Article of Drug . . . 4,680 Pails,* 775 F.2d 976, 989-90 (5th Cir. 1984). However, as an appellate court, our review of the denial of a new trial is severely limited; we may interfere only when the trial court abuses its discretion or fails to exercise it. *Id.; Bazile v. Bisso Marine Co.,* 606 F.2d 101 (5th Cir. 1979). Thus, we review the denial of a motion for new trial based on insufficiency of the evidence only to determine whether there was an "absolute absence of evidence to support the jury's verdict." *Dunn v. Sears, Roebuck & Co.,* 639 F.2d 1171, 1175 (5th Cir. 1981). We do not find such an "absolute absence" in this case.

Negligent Failure to Test.

Johns-Manville next argues that the district court erred in refusing to grant a directed verdict on Hansen's claim of negligent failure to test and inspect its asbestos products.[9] Johns-Manville asserts that the record is awash with evidence of its efforts to test and inspect its products, and its participation as early as 1929 in studies regarding asbestos-containing products. Johns-Manville points specifically to evidence that shows that it supported, funded, and provided personnel for the *Selikoff* studies, funded the *Lanza* studies, participated in the *Trudeau* studies, was a funding sponsor of the *Brayn-Truan* studies, and helped fund the *Vorwall* studies. However, each of these studies was conducted after the products were already on the market, and thus this evidence does not go to the central inquiry of the issue submitted to the jury—whether Johns-Manville was negligent in failing to test and inspect its asbestos products *before making them available on the market.*[10] Thus, we find that sufficient questions were raised by the evidence as to whether Johns-Manville tested its products within the *relevant* time frame to submit the issue to the jury. *See Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1090-91 (5th Cir. 1973) (manufacturer has duty to inspect and test product prior to putting product on market).

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9. *See supra* note 4.

10. The special interrogatory submitted to the jury inquired:

> Do you find from a preponderance of the evidence that on the occasion in question the defendant was negligent
>
> * * *
>
> (c) in failing to test and inspect its asbestos products to discover the dangerous propensities of such products before making them available in the market.

Government Specification Defense.

Johns-Manville requested that the trial judge submit the following instruction and special interrogatory to the jury:

> Where the United States Government, or an agency of the United States Government, requires that a product be manufactured and sold in conformity with governmental specifications, a manufacturer may rely upon the specifications in the manufacture and sale of its product; a manufacturer or seller is not liable for conduct arising out of the conformity of its products with such governmental specifications.
>
> Do you find from a preponderance of the evidence that the Defendant manufactured and sold, in accordance with United States governmental specifications, the asbestos containing products of Defendant which were a producing, (proximate) cause of Andrew Hansen's injury?

The trial judge refused to give the requested instruction and to submit the special interrogatory.

In federal court, "a litigant is entitled to have the jury instructed as to his claims and theories of law if they are legally correct, supported by the evidence, and are brought to the court's attention in a timely request." *Corey v. Jones,* 650 F.2d 803, 806 (5th Cir. 1981). Johns-Manville contends that the district court's refusal to instruct the jury was error because "government specification" is a defense in an asbestosis case and the evidence in the record supported submission of the issue to the jury. We do not agree.

The government specification defense has three elements: establishment of product specifications by the

government, manufacture in accordance with those specifications, and government knowledge equal to that of the manufacturer of the hazards. *In re Agent Orange Product Liability Litigation,* 506 F.Supp. 762, 792-96 (E.D.N.Y. 1980). The rationale behind the defense is an extension of sovereign immunity: in circumstances in which the government would not be liable, private contractors who act pursuant to government directives should not be liable. *Id.* Johns-Manville, citing three unpublished opinions from the Western District of Washington, contends that this defense is available to manufacturers in asbestos cases.

Johns-Manville has cited no cases in which Texas courts have recognized a "government specification" defense; nor has it cited us to any cases that suggest that Texas courts would adopt such a theory. Absent some reason to believe that the Texas courts, when presented with the question, would adopt such a defense, we are unwilling to do so. Moreover, even were we to adopt such a defense, we do not believe that it would apply in this case. Todd Shipyards, Hansen's employer, performed work under government contract for only five of Hansen's twenty-six years of employment. We do not think that the defense would apply in these circumstances. Accordingly, we hold that the district court did not err in refusing the requested instruction and interrogatory.

Refusal of Instruction as to Taxability of Damage Awards.

Johns-Manville requested that the district court instruct the jury that damage awards are not subject to federal taxation. The district court refused. Johns-Manville asserts that this refusal was error. We do not agree. This case is brought under Texas law, and that law

applies to the question whether such an instruction was warranted. *Cioce v. Brumley Corp.*, 623 F.2d 1084, 1097 (5th Cir. 1980). Texas law explicitly disapproves of such an instruction because it introduces a collateral matter into the damage issue. *Missouri-Kansas-Texas R.R. Co. v. McFerrin*, 291 S.W.2d 931, 945 (Tex. 1956); *Caterpillar Tractor Co. v. Gonzales*, 599 S.W. 2d 633 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.). Johns-Manville's reliance upon *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1980), and *Gulf Offshore Co. v. Mobil Oil Corp.*, 628 S.W.2d 171 (Tex. Civ. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.), in an attempt to show a "trend" in Texas courts to allow such instructions is misplaced. The Supreme Court, in *Liepelt*, directed such instructions in suits brought under the Federal Employers' Liability Act; *Gulf Offshore* was a case brought under Louisiana substantive law. Thus, both cases are inapposite to this case, brought under Texas law. The district court properly refused to give the requested instruction.

Denial of Motion for New Trial Based Upon Juror Misconduct.

During *voir dire*, all jurors were asked whether they or their family had previously worked with or around asbestos products. Johns-Manville contends that one juror concealed the fact that he had worked as a pipefitter while in the Navy and that, in that job, he had worked with asbestos products. Johns-Manville contends that this juror had done the same type of work as decedent had performed and that he was aware that he had worked around asbestos. Johns-Manville maintains that, had it known of this juror's work with asbestos-insulated pipes,

it would have excluded him as a juror. Johns-Manville's motion for a new trial based on jury misconduct was denied.

We review the denial of a motion for new trial for abuse of discretion. *Bunch v. Walter*, 673 F.2d 127 (5th Cir. 1982). We do not find that the district court abused its discretion in this case. Johns-Manville's allegations concerning jury misconduct arise out of a court-approved tape recorded conversation between Johns-Manville's counsel and the juror. After carefully reviewing the transcript of that conversation, we are convinced that there was no jury misconduct and that Johns-Manville's allegations are meritless. The juror stated that he was in the Navy during the Korean conflict and that he was classified as a pipefitter, but that his job was more properly characterized as a general handyman. Most of the pipefitting work was done on shore by others; his pipefitting work consisted of necessary repairs at sea and as to those he said, "I can't even really recall occasions of having that kind of problems." When asked if he ever installed or tore out insulation, the juror replied that he had never even seen any insulation on board ship. Finally, when asked if whether, in his work as a pipefitter, he ever had occasion to do any work with asbestos insulation on pipes, he answered, "if that was the type of covering." The juror's answer thus indicates that he had no prior knowledge of working with asbestos. We find that the district court did not abuse its discretion in denying Johns-Manville's motion for a new trial.

Refusal To Grant a Remittitur.

The jury awarded Hansen $260,000 in damages for the loss of her husband's care and services; $800,000 for

the decedent's pain and suffering; and $1,000,000 in punitive damages. Johns-Manville moved for remittitur, which the trial court denied. On appeal, Johns-Manville asserts that the district court erred in refusing its motion.

We have recently summarized the scope of this court's review in cases in which remittitur is urged:

> The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as "clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to." Nonetheless, when a jury's award exceeds the bounds of any reasonable recovery, we must suggest a remittitur ourselves or direct the district court to do so. Our power to grant a remittitur is the same as that of the district court. We determine the size of the remittitur in accordance with this circuit's "maximum recovery rule," which prescribes that the verdict must be reduced to the maximum amount the jury could properly have awarded.

Caldarera v. Eastern Airlines, Inc., 705 F.2d 778, 784 (5th Cir. 1983) (footnotes omitted).

We turn first to the jury's award of $260,000 to Hansen for care, services, advice, counsel and contributions of a pecuniary value that decedent would have provided but for his death. Johns-Manville asserts that the award of $260,000 is excessive because decedent was retired, had no plans to go back to work, and the only "services" he performed were driving the car and keeping the check-

book. Hansen points out that she does not drive and that she was totally dependent upon decedent to take her wherever she wanted to go. She argues that this service along with that of keeping the checkbook, as well as the care, advice, counsel and attention that decedent provided, warrants the jury's award.

Selecting a value to place upon such items as care, advice, counsel, protection and attention is a difficult task. However, the very purpose of an action for wrongful death is to fix damages in money for what cannot be measured in money's worth. Thus, as we noted in *Caldarera, supra*:

> Unless we are to accept any verdict, in whatever amount, as a legally acceptable measure, we must review the amount a jury or a trial court awards. Reassessment cannot be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation. The sky is simply not the limit for jury verdicts, even those that have been once reviewed.

705 F.2d at 784. Considering these somewhat subjective factors combined with the pecuniary value of the household services that the decedent performed, we agree with Johns-Manville that the jury verdict was excessive. The sum of $260,000 for care and services is substantially greater than any we have discovered in other reported cases.[11] We consider that the maximum verdict for care and services over the thirteen year life expectancy of

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11. *See, e.g., Barger v. Petroleum Helicopters, Inc.*, 514 F.Supp. 1199 (E.D. Tex. 1981) (award of $22,090 for loss of services of 46-year-old man); *State v. Teer*, 542 S.W.2d 255 (Tex. Civ. App. —Waco 1976, writ ref'd n.r.e.) (award of $15,000 for loss of household services of 26-year-old woman); *C.E. Duke's Wrecker Service, Inc. v. Oakley*, 526 S.W.2d 228 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (award of $6,000 for loss of wife's services).

decedent that the district court should have permitted to stand, without remittitur, was $40,000.

We similarly determine that the jury's award of $800,000 for pain and suffering was contrary to reason. Decedent's symptoms began to manifest themselves in May, 1978; he died thirteen months later. During most of this thirteen month period, decedent was on pain medication. While the evidence showed that decedent suffered some pain despite the medication and that he suffered mental anguish as well, we find that $800,000 is excessive.[12] Accordingly we consider that the maximum verdict for pain and suffering that the trial court should have let stand, on this record, was $250,000.

We turn next to the jury's award of punitive damages. Under Texas law, "the amount of exemplary damages should be reasonably proportioned to the actual damages found." *Southwestern Investment Co. v. Neely,* 452 S.W. 2d 705 (Tex. 1970); *see also Maxey v. Freightliner Co., supra,* at 1377. Texas courts look to five factors in evaluating whether a punitive damage award is proportionally excessive: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and (5) the extent to which the defendant's conduct offends a public sense of justice and propriety.

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12. *Compare with Amoco Production Co. Inc. v. Thompson,* 657 S.W.2d 824 (Tex. Civ. App.—Corpus Christi 1983) ($105,000 to welder for pain and suffering occurring from severe burns); *Hernandez v. Braddock,* 641 S.W.2d 359 (Tex. Civ. App.—Corpus Christi 1982) ($50,000 award to woman who suffered fractured clavicle, fractured pelvis, dislocation of joints in her pelvis, and multiple skin abrasions); *Ferrero v. United States,* 603 F.2d 510 (5th Cir. 1979) (award of $375,000 to 53-year-old female who was severely and painfully injured in automobile accident for pain and suffering *and* loss of earning capacity).

First Security Bank & Trust Co. v. Roach, 493 S.W.2d 612, 619 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.). In addition to these factors, when an appellate court has determined that a remittitur of a substantial portion of the actual damages found by a jury is required, it must then also give consideration to the ratio between actual and punitive damages as established by the jury. *Southwestern Investment Co. v. Neely, supra,* at 708. *See also Natco, Inc. v. Williams Brothers Engineering Co.,* 489 F.2d 639 (5th Cir. 1974) (district court directed to order remittitur of actual damages and proportionate remittitur of punitive damages).

The jury awarded Hansen punitive damages that approximately equaled actual damages. Having determined that a remittitur of actual damages is required in this case, we find that a proportionate reduction of punitive damages is required. Accordingly, we determine that a remittitur of punitive damages to $300,000 is proper in this case.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed as to liability. However, we reverse as to damages, and remand to the district court. On remand, Hansen shall be given the option of accepting or rejecting the remittitur thus determined. If Hansen accepts the remittitur, the district court shall grant the remittitur and enter judgment accordingly. If Hansen refuses the remittitur, the district court shall grant a new trial solely on the issue of damages.

The judgment of the district court is AFFIRMED in part, REVERSED in part and REMANDED with instructions. Costs to be borne by appellant.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 82-2276

BEATRICE MAE HANSEN, ET AL.,
Plaintiffs-Appellees,

v.

JOHNS-MANVILLE SALES PRODUCTS
CORPORATION, ET AL.,
Defendants,

JOHNS-MANVILLE SALES CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITIONS FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion June 11, 5 Cir., 1984, ____F.2d____)

(September 12, 1984)

Before RUBIN, RANDALL, Circuit Judges, and Judge Sear*, District Judge.

PER CURIAM:

* * *

The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the

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* Sear, District Judge of the Eastern District of Louisiana, sitting by designation.

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

* * *

ENTERED FOR THE COURT:

/s/ CAROLYN DINEEN RANDALL
United States Circuit Judge

REHG-7

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION NO. G-79-124

BEATRICE MAE HANSEN, etc., et al
Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION
Defendant

(Filed Mar. 29, 1982)

VERDICT OF THE JURY

INTERROGATORY NO. 1

Do you find from a preponderance of the evidence that Andrew T. Hansen was injured as a result of his being exposed to insulation products containing asbestos manufactured and sold by the defendant.

Answer: "Yes" or "No"

ANSWER: Yes

INTERROGATORY NO. 2

Do you find from a preponderance of the evidence that prior to 1964 it was reasonably foreseeable by defendant that occupational exposure to said products by the de-

ceased and similarly situated workers might cause serious respiratory illness.

Answer: "Yes" or "No"

ANSWER: Yes

If your answer to Interrogatory No. 2 is "Yes," then answer Interrogatory No. 3; otherwise proceed to Interrogatory No. 5.

INTERROGATORY NO. 3

Do you find from a preponderance of the evidence that the absence of warning prior to 1964 to deceased and similarly situated users that occupational exposure to defendant's asbestos products might cause serious respiratory illness constituted a defective condition in the products which rendered their use unreasonably dangerous.

Answer: "Yes" or "No"

ANSWER: Yes

If your answer to Interrogatory No. 3 is "yes," then answer Interrogatory No. 4; otherwise proceed to Interrogatory No. 5.

INTERROGATORY NO. 4

Do you find from a preponderance of the evidence that the defective condition of the products was a producing cause of the death of the deceased, Andrew T. Hansen.

Answer: "Yes" or "No"

ANSWER: Yes

INTERROGATORY NO. 5

Do you find from a preponderance of the evidence that on the occasion in question the defendant was negligent.

(a) In failing to warn prior to 1964 that occupational exposure by the deceased to defendant's asbestos products might cause serious respiratory illness;

(b) in failing to provide the deceased with knowledge of reasonably safe protective equipment or methods of handling its products;

(c) in failing to test and inspect its asbestos products to discover the dangerous propensities of such products before making them available in the market.

Answer: "Yes" or "No" on each line in Column 1.

If any answer in Column 1 is "yes," do you find from a preponderance of the evidence that any such negligence was a proximate cause of the death of Andrew T. Hansen.

Answer: "Yes" or "No" on the corresponding line of Column 2.

	Column 1 Negligence	Column 2 Proximate Cause
(a) in failing to warn	Yes	Yes
(b) in failing to provide with knowledge	Yes	Yes
(c) in failing to test and inspect	Yes	Yes

If your answer to Interrogatory No. 4 is "yes," or if any of your answers in Column 2 of Interrogatory No. 5 are "yes," then answer Interrogatories No. 6 & No. 7; otherwise do not answer Interrogatories No. 6 and 7.

INTERROGATORY NO. 6

What sum of money, if any, if paid now in cash do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff for her pecuniary loss, if any, resulting from the death of Andrew T. Hansen.

Consider the following elements, if any, to the extent that they are proved by a preponderance of the evidence and none other: care, services, advice, counsel, and contributions of pecuniary value that plaintiff would in reasonable probability have received from Andrew T. Hansen during his lifetime had he lived.

There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in light of the circumstances.

In arriving at an award of damages, you must not consider and cannot allow the plaintiff any amount of money as compensation for grief, sorrow, anguish or bereavement suffered by her as a result of the death of Andrew T. Hansen, or compensation for the loss of society, affection, or companionship of the deceased.

Answer: State an amount in dollars and cents, if any.

ANSWER: $260,000.00

INTERROGATORY NO. 7

What sum of money, if any, do you find from a preponderance of the evidence would have fairly and reasonably compensated Andrew T. Hansen for his conscious physical pain, if any, and mental anguish, if any, suffered before his death, as a result of the occurrence in question.

There is no exact standard for fixing the compensation to be awarded on account of such elements of damage. Any such award should be fair and just in light of circumstances.

Answer: State an amount in dollars and cents, if any.

ANSWER: $800,000.00

If you have answered Interrogatories No. 6 and No. 7, then answer Interrogatory No. 8; otherwise do not answer Interrogatory No. 8.

INTERROGATORY NO. 8

Do you find from a preponderance of the evidence that the defendant committed acts of gross negligence, and that such gross negligence was a proximate cause of the death of Andrew T. Hansen.

Answer: "Yes" or "No."

ANSWER: Yes

If your answer to Interrogatory No. 8 is "Yes," then answer Interrogatory No. 9; otherwise do not answer Interrogatory No. 9.

INTERROGATORY NO. 9

What sum of money, if any, do you find from a preponderance of the evidence that plaintiff should be awarded against the defendant as punitive damages for the death of Andrew T. Hansen.

Answer: State an amount in dollars and cents, if any.

ANSWER: $1,000,000.00

The foregoing constitutes the verdict of this jury.

/s/ ELNA M. LONG
Foreperson

Date: March 29, 1981

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. G-79-124

BEATRICE MAE HANSEN, etc., et al,
Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
Defendant

(Filed May 11, 1982)

JUDGMENT

THE COURT, having determined that there is no just reason for delay, directs the entry of a final judgment as to plaintiff's claims against the defendant Johns-Manville Sales Corporation pursuant to Fed. R. Civ. P. 54(b). Now, in accordance with the true verdict of the jury and the stipulations of record between the parties in this case, it is

ORDERED, ADJUDGED and DECREED that plaintiff, Beatrice Mae Hansen, recover of the defendant, Johns-Manville Sales Corporation the sum of TWO MILLION SEVENTY THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($2,070,500.00), together with interest thereon at the rate of nine percent (9%) per annum from the date of judgment until finally paid; and

Further ORDERED that the intervenors, The Travelers' Insurance Companies and Charter Oak Fire Insurance Company, have and recover from the proceeds of said judgment the sum of SIXTY-ONE THOUSAND FIVE HUNDRED AND 51/100 DOLLARS ($61,500.51), plus an additional TWO HUNDRED SIXTY-ONE AND 51/100 DOLLARS ($261.51) for each week after March 15, 1982, beginning March 22, 1982, and each week thereafter through the date of Judgment.

Taxable costs of court, if any, are assessed against the defendant.

This is a final judgment only as to plaintiff's claims against Johns-Manville Sales Corporation. Cross-actions filed by Johns-Manville Sales Corporation have been severed for trial and are pending.

DONE this the 11th day of May, 1982, at Galveston, Texas.

/s/ HUGH GIBSON
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. G-79-124

BEATRICE MAE HANSEN, etc., et al,
Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
Defendant

(Filed April 27, 1982)

MEMORANDUM AND ORDER

Plaintiff brought this diversity action seeking actual and exemplary damages for the wrongful death of her husband, Andrew T. Hansen. Plaintiff alleged that her husband's death was caused by exposure during the course of his employment at Todd Shipyards to asbestos-containing products manufactured and sold by the defendant. The case was tried before a jury upon theories of product liability, negligence, and gross negligence.

The jury returned a verdict for the plaintiff, awarding the plaintiff $1,060,000 in compensatory damages. Additionally, the parties had stipulated to a sum of $10,500 as the reasonable and necessary medical expenses incurred by the decedent.

Pending before the Court is the plaintiff's motion for entry of judgment, and the defendant's motion for judg-

ment notwithstanding the verdict as to the award of punitive damages. For the reasons set forth below, the defendant's motion for judgment notwithstanding the verdict is denied, and plaintiff's motion for entry of judgment is granted.

In *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), the Fifth Circuit established the standard by which this Court must determine whether there is sufficient evidence to submit a case to the jury in connection with motions for directed verdict and for judgment *non obstante veredicto*. Under the standard established in *Boeing* a motion for judgment n.o.v. should be granted only when the facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict. The Court should consider all of the evidence, not just that evidence which supports the non-movant's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions, the motion should be denied. There must be a conflict in substantial evidence to create a jury question; a mere scintilla of evidence is insufficient. However, it is the function of the jury as a traditional finder of fact, and not the court, to weigh conflicting evidence and inferences, and to determine the credibility of witnesses. *Id.* at 374-75; *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1371 (5th Cir. 1982). *See Schwartz v. Sears, Roebuck & Co.*, 669 F.2d 1091, 1093 (5th Cir. 1982).

In this case the *Boeing* standard must be applied in light of substantive state law governing the availability of exemplary or punitive damages for wrongful death. Under Texas law, gross negligence can be a ground for punitive damages. Tex. Const. art. 16 § 26. Texas courts traditionally have defined gross negligence as "that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it." *Missouri Pacific Railroad Co. v. Shuford,* 72 Tex. 165, 10 S.W. 408, 411 (1888). *See Burk Royalty Co. v. Walls,* 616 S.W.2d 911 (Tex. 1981).

The essence of gross negligence is not the neglect which must, of course, exist. What lifts ordinary negligence into gross negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of punitive damages. The plaintiff must show that the defendant was consciously, *i.e.,* knowingly, indifferent to his rights, welfare and safety. In other words, the plaintiff must show that the defendant knew about the peril, but his acts or omission demonstrated that he did not care. *Burk Royalty, supra,* at 922. Thus, rather than simply inquiring whether the defendant exercised some care or no care, the proper focus under Texas law is whether, in light of all the surrounding circumstances, the requisite mental state is shown. *Maxey v. Freightliner, supra,* at 1374.

Having reviewed the instant record under the standard established in *Boeing,* as informed by the substantive principles articulated in *Burk Royalty,* the Court is of the opinion that the jury's finding of gross negligence,

and its award of punitive damages, must be sustained. Giving proper deference to the traditional functions of the jury as the finder of fact, the Court is of the opinion that there is evidence of such quality and weight, when viewed most favorably to the plaintiff, that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions as to whether there was such an entire want of care as to show that the defendant was consciously indifferent to the rights, welfare, and safety of the decedent. The evidence established almost beyond dispute that the decedent's death was the result of his exposure during the 1940's to defendant's asbestos-containing products. There was a substantial evidentiary conflict as to the defendant's knowledge of the dangerous propensities of its products at that time, and the issue was properly submitted to the jury. Having determined the extent of the defendant's knowledge, the determination whether the defendant's conduct in light of all the surrounding circumstances, evidenced conscious indifference to the rights and welfare of the decedent, *i.e.*, that the defendant "didn't care," *Burk Royalty, supra,* at 922, was one to be made by the finder of fact. *See Schwartz v. Sears, Roebuck & Co., supra,* at 1095.

Therefore, it is ORDERED, ADJUDGED and DECREED that the defendant's motion for judgment n.o.v. is DENIED, and that the plaintiff's motion for entry of judgment is GRANTED.

DONE at Galveston, Texas, this the 27th day of April, 1982.

/s/ HUGH GIBSON
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION No. G-79-124

BEATRICE MAE HANSEN,
Plaintiff

v.

JOHNS-MANVILLE SALES CORPORATION,
Defendant

(Filed June 8, 1982)

ORDER

BEFORE THE COURT are the defendant's motions for new trial or, in the alternative, for remittitur. Having considered said motions, the Court is of the opinion that they should be in all respects denied. Therefore, it is

ORDERED, ADJUDGED and DECREED that defendant's motions for new trial, or in the alternative, for remittitur be, and the same hereby are DENIED.

DONE this the 8th day of June, 1982, at Galveston, Texas.

/s/ HUGH GIBSON
United States District Judge

APPENDIX G

UNITED STATES CONSTITUTION, SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

APPENDIX H

FEDERAL RULES OF CIVIL PROCEDURE, RULE 59

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have

granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.